

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 10, 2007 Session

JASON DIGREGORIO v. C. GARY JACKSON, M.D., ET AL.

**Appeal from the Circuit Court for Davidson County
No. 04C-2621 Marietta Shipley, Judge**

No. M2006-01547-COA-R3-CV - Filed September 21, 2007

The defendant otologist performed surgery on the right ear of a man who suffered from a congenital condition. The patient claimed that for more than nine years after the surgery he suffered from chronic infections and a foul-smelling discharge from that ear. Another otologist finally revised the earlier surgery and discovered a small piece of sponge-like material in the patient's mastoid cavity, which the patient alleged had caused his infections and had been left there by the defendant almost ten years earlier. The defendant filed a motion for summary judgment, contending that the patient's complaint was time-barred because of the passing of the one-year statute of limitations and the three-year statute of repose for medical malpractice. The trial court granted the motion. The plaintiff argues on appeal that the trial court erred because it failed to properly consider Tenn. Code Ann. § 29-26-116(a)(4) of the medical malpractice act, which sets out a separate statute of limitations "in cases where a foreign object has been negligently left in a patient's body" We affirm the trial court's judgment.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Affirmed**

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and FRANK G. CLEMENT, JR., J., joined.

Michael C. Skouteris, Milton E. Magee, Jr., Memphis, Tennessee, for the appellant, Jason Digregorio.

C.J. Gideon, Jr., Nashville, Tennessee, for the appellees, C. Gary Jackson, M.D. and the Otology Group.

OPINION

I. A SURGICAL PROCEDURE AND ITS AFTERMATH

Jason DiGregorio, the plaintiff herein, was born with two congenital ear abnormalities. The first abnormality, a malformation of the external ear, was corrected by plastic surgery when Mr. DiGregorio was a small child. The second abnormality, congenital atresia, is the absence of an external auditory ear canal. That condition is generally treated when the patient is fully grown. When Mr. DiGregorio was nineteen years old, his plastic surgeon referred him for treatment to an otologist, Dr. Gary Jackson, the defendant.

Dr. Jackson determined that surgery was advisable, and he explained the details of the proposed operation and its possible risks and complications to the plaintiff, who signed a pre-operative informed consent form. Plaintiff was also furnished with a written disclosure of those risks and complications, which included the following: "Infection may develop following surgery in rare occasions (1%). Should infection occur, hospitalization for antibiotic therapy may be prolonged. Severe infections may jeopardize the surgical result requiring later re-operation."

On July 22, 1994, Dr. Jackson performed surgery on Mr. DiGregorio's right ear. The procedure was a modified radical mastoidectomy, in which the surgeon removes the posterior walls that separate the external ear canal from the mastoid space, which is located behind the ear. That allows the surgeon to reconstruct the middle ear and to insert a permanent prosthesis into the ear to improve the patient's hearing.

During the procedure, skin grafts from Mr. DiGregorio's hip were used to line the newly formed external ear canal. The grafts were supported by an overlayment of parachute silk. Pieces of a special spongy kind of material called Weck-Cel were wetted with gentamicin solution and inserted into the ear canal as a stent or expansive packing to hold the parachute silk and skin grafts in place. A dry sterile compressive dressing was also applied over the ear, and the patient was instructed to change the dressing periodically. He was told not to be alarmed if some of the packing fell out of the ear as he changed the dressing.

On August 23, 1994, Dr. Jackson followed up on his initial surgery by removing the parachute silk and the packing from Mr. DiGregorio's ear. Dr. Jackson later stated that there was no indication at the conclusion of the procedure that anything had been retained in the operative site.

Mr. DiGregorio returned for several more follow-up appointments in 1994. Dr. Jackson examined the patient and observed that his hearing had dramatically improved, but he did not note any abnormal drainage from the ear during those visits. Dr. Jackson referred Mr. DiGregorio for a hearing aid, which did apparently cause a problem, for Mr. DiGregorio called Dr. Jackson's office on November 1, 1994, and his secretary took a message: "Please call - ear bleeding, just had ear molds made."

Another phone message from the patient's mother was dated December 12, 1994, just prior to a December 15 follow-up visit, which indicated that she was concerned about an unpleasant smell coming from her son's ear. There is no evidence that Dr. Jackson observed anything amiss during that appointment. A return appointment was scheduled for January 9, 1995, but Mr. DiGregorio did not appear or call to cancel or reschedule. Nor did he contact Dr. Jackson at any time thereafter to seek services, advice, assistance, or a referral. Mr. DiGregorio lived in Memphis, and Dr. Jackson practiced in Nashville.

According to Mr. DiGregorio's complaint, over the next nine years he suffered from recurrent ear infections and foul-smelling drainage from the right ear. In 2003, Mr. DiGregorio was referred to Dr. Mary McCalla. She recommended that exploratory surgery be performed. During the course of the surgery, which Dr. McCalla performed on September 16, 2003, she found a foreign body in the tip of the mastoid cavity, close to the problematic ear, which she thought was "a possible nidus of infection and persistent disease." She removed the object and sent it to pathology, which reported that it was an "irregular shaped spongy fragment with a flat surface on two sides measuring approximately 0.7 x 0.5 x 0.3 cm."

II. PROCEEDINGS IN TRIAL COURT

On September 10, 2004, Mr. DiGregorio filed suit against Dr. Jackson and his practice group in the Circuit Court of Davidson County.¹ The complaint alleged that Dr. Jackson had committed medical malpractice by failing to remove all the packing from Mr. DiGregorio's ear during the procedure in August of 1994 and by failing to detect the presence of the retained sponge during several follow-up appointments. Mr. DiGregorio asked the court to award him compensatory damages of "not less than \$925,000" for the pain and suffering he endured over a period of almost ten years from ear infections and drainage allegedly resulting from the presence of the retained sponge, as well as for the additional medical expenses incurred to remove it.

Dr. Jackson's answer denied that he had left any packing behind and asserted that the plaintiff's claim was barred by the passing of the one year statute of limitations and the three year statute of repose for medical malpractice. *See* Tenn. Code Ann. § 29-26-116. He also raised the affirmative defense of comparative fault, essentially contending that the plaintiff's own delay in seeking treatment substantially increased his alleged injury.

Mr. DiGregorio filed a motion for partial summary judgment on the issue of liability, and Dr. Jackson also filed a motion for summary judgment. On July 5, 2006, the court filed a memorandum opinion and an order denying the plaintiff's motion for summary judgment and granting the defendant's motion for summary judgment on the ground that the action was time barred.

This appeal followed.

¹ Baptist Hospital was originally named as an additional defendant. The trial court dismissed Mr. DiGregorio's claim against Baptist Hospital on summary judgment on March 6, 2006. That judgment was not appealed.

III. THE QUESTION OF TIMELINESS

A trial court's decision on a motion for summary judgment enjoys no presumption of correctness on appeal. *Draper v. Westerfield*, 181 S.W.3d 283, 288 (Tenn. 2005); *BellSouth Advertising & Publishing Co. v. Johnson*, 100 S.W.3d 202, 205 (Tenn. 2003); *Scott v. Ashland Healthcare Ctr., Inc.*, 49 S.W.3d 281, 284 (Tenn. 2001); *Penley v. Honda Motor Co.*, 31 S.W.3d 181, 183 (Tenn. 2000). We review the summary judgment decision as a question of law. *Finister v. Humboldt Gen. Hosp., Inc.*, 970 S.W.2d 435, 437 (Tenn. 1998); *Robinson v. Omer*, 952 S.W.2d 423, 426 (Tenn. 1997). Accordingly, this court must review the record *de novo* and make a fresh determination of whether the requirements of Tenn. R. Civ. P. 56 have been met. *Eadie v. Complete Co., Inc.*, 142 S.W.3d 288, 291 (Tenn. 2004); *Blair v. West Town Mall*, 130 S.W.3d 761, 763 (Tenn. 2004); *Staples v. CBL & Assoc.*, 15 S.W.3d 83, 88 (Tenn. 2000).

The question of the timeliness of Mr. DiGregorio's lawsuit is the determinative issue in this case. The statutes of limitation and repose for medical malpractice cases are set out in Tenn. Code Ann. § 29-26-116 as follows:

- (a)(1) The statute of limitations in malpractice actions shall be one (1) year as set forth in § 28-3-104.
- (2) In the event the alleged injury is not discovered within such one (1) year period, the period of limitation shall be one (1) year from the date of such discovery.
- (3) In no event shall any such action be brought more than three (3) years after the date on which the negligent act or omission occurred except where there is fraudulent concealment on the part of the defendant, in which case the action shall be commenced within one (1) year after discovery that the cause of action exists.
- (4) The time limitation herein set forth shall not apply in cases where a foreign object has been negligently left in a patient's body, in which case the action shall be commenced within one (1) year after the alleged injury or wrongful act is discovered or should have been discovered.

More than ten years elapsed between the alleged negligent act of Dr. Jackson and the filing of the complaint herein. Consequently, there can be no dispute that the action was untimely under either the one year statute of limitations or the three year statute of repose unless its facts brought it within one of the exceptions. The fraudulent concealment exception to the three year statute of repose is not at issue.

Instead, Mr. DiGregorio insists that his claim should be considered timely because of the "foreign object exception" found in Tenn. Code Ann. § 29-26-116(a)(4). This exception applies to both the one year statute of limitation and the three year statute of repose. *Chambers v. Semmer*, 197 S.W.3d 730, 737 (Tenn. 2006). Mr. DiGregorio notes that his complaint was filed less than a year after Dr. McCalla discovered the foreign object in his mastoid space and argues that the statute only began to run upon the date of that discovery.

The trial court analyzed the requirements of Tenn. Code Ann. § 29-26-115(a)(4) and their application to the undisputed facts in this case. Following a detailed recitation of the relevant facts and quotation of the “foreign object” exception in the statute, the trial court held that the statute of limitations begins to run when the patient discovers, or in the exercise of ordinary care and diligence for his own health and welfare, should have discovered the resulting injury, relying on *Teeters v. Currey*, 518 S.W.2d 512 (Tenn. 1974). The trial court concluded:

A reasonable person would have discovered that there was some problem with his ear, which would have related back to the surgery in 1994. . . . Ten years is simply too long a time from any symptoms occurring and the filing of the lawsuit. It was simply not justified for him to wait from 1996 to 2003. Thus, the plaintiff’s cause of action fails because he failed to file an action within one year of his discovery of the injury or when he reasonably should have discovered the injury.

We agree with the trial court that the plain language of Tenn. Code Ann. § 29-26-115(a)(4) imposes a reasonableness requirement on a plaintiff’s discovery of an injury. The statute extends the time limitation for filing a lawsuit until one year after “the alleged injury or wrongful act is discovered or **should have been discovered.**” Thus, the statutory exception does not extend the time until one year after the discovery of a foreign object regardless of the reasonableness or diligence of the plaintiff. Instead, in order to obtain the benefit of the extension of the normally applicable statute of limitations, the plaintiff’s delay in discovering the injury must have been reasonable.

The “should have been discovered” language of Tenn. Code Ann. § 29-26-115(a)(4) imposes the reasonableness requirement. The generally applicable “discovery rule” set out in Tenn. Code Ann. § 29-26-115(a)(2) does not include such language. Nonetheless, our courts have held that that subsection incorporates a duty of reasonable diligence, *i.e.*, a plaintiff may not wait to file suit until he achieves certainty as to the fact, extent or cause of his injury. Rather, “the statute does not commence to run until the patient discovers his injury, or through the **exercise of reasonable diligence** should have discovered it.” *Teeters v. Currey*, 518 S.W.2d at 516 (emphasis added).

For the medical malpractice statute of limitations to begin running, “. . . a plaintiff need not actually know the type of legal claim he or she has so long as the plaintiff is aware of facts sufficient to put a reasonable person on notice that he has suffered an injury as a result of wrongful conduct.” *Stanbury v. Bacardi*, 953 S.W.2d 671, 678 (Tenn. 1997). *See also Shadrick v. Coker*, 963 S.W.2d 726, 733-34 (Tenn. 1998); *Roe v. Jefferson*, 875 S.W.3d 653, 657 (Tenn. 1994); *Bennett v. Hardison*, 746 S.W.2d 713, 714 (Tenn. Ct. App. 1987). Contrary to Mr. DiGregorio’s argument in this appeal, this standard, which was applied by the trial court, does not require that he have self-diagnosed the cause of his persistent infections, drainage, or related problems before the 2003 surgery. It merely requires that he have made reasonable efforts to discover that cause.

Therefore, the question for this court is whether Mr. DiGregorio was aware of facts sufficient to put a reasonable person on notice that he had sustained an injury or complication related to the

surgery on his ear. In our review, we must consider the evidence presented at the summary judgment stage in the light most favorable to the non-moving party, herein Mr. DiGregorio, and we must afford that party all reasonable inferences. *Draper*, 181 S.W.3d at 288; *Doe v. HCA Health Servs., Inc.*, 46 S.W.3d 191, 196 (Tenn. 2001).

Mr. DiGregorio testified in his deposition that he began to experience drainage of a thick yellowish and foul-smelling fluid from his right ear on a near daily basis in the spring of 1996 and that he had never had that kind of drainage before Dr. Jackson's surgery. During this period of time he was going to college and was living with his parents. His mother testified that the drainage actually began in 1994, soon after the surgery, but that it increased or decreased at different times. She usually did the laundry and became aware of the discharge because of the stains she saw on her son's pillowcase.

Mr. DiGregorio's mother and father both urged their son to see a doctor for the drainage and for the pain he sometimes suffered in his right ear,² but he did not take their advice because he was embarrassed about his condition. He sought medical attention for other problems he had prior to the year 2000, but during those appointments he did not bring up the chronic ear problems he was suffering. In his daily life, he tried to hide the problem as much as possible, cleaning his ear constantly, and putting cologne in the area to disguise the smell.

On September 14, 2000, the plaintiff finally went to a doctor for the specific purpose of receiving treatment relating to the problems with his ear. Dr. Summers of the Hickory Hill Family Medical Clinic examined the plaintiff, gave him ophthalmic drops for his ear, and an appointment to return one week later. The plaintiff did not return.

The drainage continued however, and at some point (it is unclear from the record exactly when) a new symptom arose in the form of additional drainage from the area directly behind the plaintiff's ear. On May 20, 2002, the plaintiff went to Dr. Jordan, who referred him to Dr. Hodge, an ear, nose and throat specialist. Dr. Hodge cleaned Mr. DiGregorio's ear out and gave him antibiotics. The procedure was painful and produced a lot of discharge and blood. The plaintiff did not return to Dr. Hodge because he felt the doctor was too rough with him. In 2003, Doctor Jordan referred Mr. DiGregorio to Dr. McCalla, who as we discussed earlier, performed the surgery that resulted in the discovery of the object in his mastoid tip.

Mr. DiGregorio began experiencing malodorous drainage from his ear "around the year [19]96." Even though the condition continued for the next seven years, at no time did Mr. DiGregorio contact Dr. Jackson to inquire about this problem, to clarify any instructions he may have been given, or to otherwise seek follow-up treatment or guidance. Further, he did not seek medical attention from anyone for his condition until September 14, 2000. Thus, he delayed medical

²Sonia DiGregorio testified that she told her son to see a doctor "at least several times a year." Jason DiGregorio was asked at his deposition how many times his mother urged him to go to the doctor to have his ears examined. He responded "I would say less than ten times."

attention that could have led to the discovery of the “foreign object” for more than four years after the drainage began. He did not return for a scheduled follow-up visit after that appointment. It was twenty months before he sought medical treatment again.

In light of the chronic nature of his symptoms, the discomfort and embarrassment they caused him, and the urgings of others to seek medical attention, we fail to see how Mr. DiGregorio’s delay in seeking treatment can be considered reasonable. Although the precise alleged cause of the infections and drainage was not discovered until the second surgery in 2003, Mr. DiGregorio admitted that he believed the drainage was related to the earlier surgery by Dr. Jackson.³ Regardless, he did not exercise ordinary care or diligence for his own health or welfare.

On appeal, plaintiff attempts to salvage his claim by alleging that Dr. Jackson told him during a follow-up appointment that some drainage from the ear was normal and that he should only seek medical intervention if he actually saw blood coming from the ear. Assuming that such an instruction was given, it does not relieve Mr. DiGregorio from taking reasonable steps to determine whether the type and duration of drainage he suffered was normal or, in fact, resulted from some other cause. It also does not make reasonable his failure to seek medical attention for the persistent, embarrassing, and sometimes painful symptoms he experienced.

In *Bennett v. Hardison*, the plaintiff attempted to avoid the statute of limitations by arguing that he did not discover his injury, permanent numbness resulting from extraction of a wisdom tooth, until he saw a dentist eight months after the extraction, because the dentist who extracted the tooth had told him he would experience some temporary numbness. This court found that his claim was barred by the statute of limitations, stating,

even though plaintiff may have been justified in accepting a brief period of numbness as a necessary incident of the surgery, absent **evidence of some unusual cause for the delay**, the defendant was not justified in delaying the “discovery” of the permanence of his injury from February 24, 1984, until “around October, 1984”, a period of some 8 months. At some time during that 8 months, any reasonable person would have concluded that the brief, temporary numbness normally incident to oral surgery had outlasted its welcome and had become an unacceptable incident to the surgery.

Bennett v. Hardison, 746 S.W.2d at 714 (emphasis added). The same reasoning applies herein.

After our own *de novo* review, we reach the same conclusion as the trial court. Mr. DiGregorio is not entitled to rely on the exception in Tenn. Code Ann. § 29-26-116(a)(4) because he did not bring his lawsuit within one year of when, through reasonable diligence, he should have discovered the injury he alleges was caused by Dr. Jackson.

³In fact, Mr. DiGregorio testified that he assumed the drainage came from a persistent infection, and that he thought the problem might stem from the skin grafts that Dr. Jackson had used.

IV.

The judgment of the trial court is affirmed. We remand this case to the Circuit Court of Davidson County for any further proceedings necessary. Tax the costs on appeal to the appellant.

PATRICIA J. COTTRELL, JUDGE